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COURT OF CRIMINAL APPEALS
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No. PD-0242-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

WILLIAM ROGERS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Refugio County

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STATE'S BRIEF ON THE MERITS

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant says that anyone caught hiding in the bedroom closet of a homeowner would reasonably be afraid of that homeowner. He is right. That is because that homeowner's use of force would be justified. Shooting that homeowner first shouldn't be.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

ISSUES PRESENTED

This Court granted review of the court of appeals's decision that a reasonable person in appellant's shoes would not have believed a threat was imminent or that the victim was about to use unlawful force. But the real issue is whether any rational jury

would have believed that the *victim* was not justified in using force against appellant, who was found hiding in the victim's closet.

SUMMARY OF THE ARGUMENT

Appellant says that shooting a homeowner who discovers you hiding in his closet is justifiable because that homeowner would have a really good reason to use force against you. Without realizing it, appellant's argument also explains why the homeowner's use of force would be lawful. Neither self-defense nor necessity should be available to a defendant who preemptively shoots a homeowner who was acting lawfully under even appellant's view of the evidence. Either appellant has talked himself out of justification as a matter of law or he has explained why no rational jury would buy it, this Court's prior harm analysis notwithstanding.

ARGUMENT

I. No rational jury would find shooting an innocent homeowner to be justified by self-defense or necessity.

This is one of the rare cases in which a defendant who plainly admits to committing an assault should be denied a justification defense as a matter of law. No jury should be permitted to acquit a defendant who shoots someone he knows is a homeowner who has no reason to expect to find the defendant hiding in his bedroom closet.

A. The trial court has a duty to protect the jury system.

A trial court is not required to permit the jury to return an irrational verdict. Quite the opposite; a trial court should act to prevent it by, in this case, refusing to submit a defensive instruction unless "that defense is a rational alternative to the defendant's criminal liability."[1] This "serves to preserve the integrity of the jury as the factfinder by ensuring that it is instructed as to a defense only when, given the evidence, that defense is a rational alternative to the defendant's criminal liability."[2]

This practice makes sense, but it naturally creates tension with 1) the general rule that the "jury is judge of facts,"[3] and 2) the specific rule that "[a] defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense."[4] The Court has reconciled the two by distinguishing the roles of the judge and jury: a jury is entitled

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[1] *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007). *See Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997), *overruled on other grounds by Grey v. State*, 298 S.W.3d 644 (Tex. Crim. App. 2009) (requiring that a lesser-included offense be a "valid, rational alternative" "preserves the integrity of the jury as the factfinder"; a more liberal rule "would constitute an invitation to the jury to return a compromise or otherwise unwarranted verdict").

[2] *Shaw*, 243 S.W.3d at 658.

[3] TEX. CODE CRIM. PROC. art. 36.13 (title); *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016) (jury is the sole judge of credibility and weight to be attached to the testimony of witnesses).

[4] *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001).

to determine credibility, but rationality is a matter of law.[5] It is through this lens that this case must be decided.

B. Appellant explains why he had no reasonable fear of unlawful force.

"[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force."[6] The key word is "unlawful." By appellant's account, the homeowner acted lawfully.

Appellant says he reasonably believed he was in "an immediately dangerous situation necessitating action or requiring self-defense"[7] because all the reasons a person might be afraid of a lover's knife-wielding husband "would be compounded by the fact that Appellant was in the alleged victim's home."[8] More specifically, he was hiding in the homeowner's bedroom closet and the wife was not home. In effect, appellant's "reasonableness" argument is premised on the fact that a homeowner in that situation can be expected to perceive a threat of imminent harm and act accordingly.

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[5] *See Brooks v. State*, 323 S.W.3d 893, 907 (Tex. Crim. App. 2010) (plurality) (although within the jury's prerogative, believing a witness but disbelieving a "properly authenticated surveillance videotape of the event clearly show[ing]" the opposite "is not a rational finding.").

[6] TEX. PENAL CODE § 9.31(a).

[7] App. Br. at 14.

[8] App. Br. at 10, 16-17.

Without saying so, appellant has explained why the victim's use or attempted use of force was lawful. That is fatal to appellant's argument because an actor in appellant's position is never justified using force against the lawful use of force. Although it is unclear what the trial court knew of appellant's version of events when it foreclosed this defense pretrial, there is no amount of plucking that can make it more than what it is: an actor who shot a surprised homeowner because he recognized what the homeowner would reasonably—could lawfully—do in that moment. Under the circumstances, it would be irrational for a jury to conclude appellant's use of deadly force was justified.

This is not a self-defense case.

C. Appellant's justification makes even less sense, legally and rhetorically, when framed as necessity.

Under the "necessity" statute, "conduct is justified if:"

> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
>
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.[9]

[9] TEX. PENAL CODE § 9.22.

Although necessity does not contain the same explicit requirement of unlawful force as self-defense, the result should be the same. Unfortunately, this Court has foreclosed the argument under subsection (3) that the Legislature has excluded necessity to use force against another by virtue of its enactment of Section 9.31. Fortunately, the same result can be arrived at through rational consideration of subsection (2).

i. "A legislative purpose to exclude" should be clear from the existence of a dedicated self-defense statute.

The issue of a plain legislative purpose to exclude the justification is one of law.[10] It should be simple to explain, as a matter of law, why a defendant who cannot justify his use of force against another using self-defense under Sections 9.31 and 9.32[11] cannot show it was necessary under Section 9.22. But that is not the law.

In *Bowen v. State*, this Court rejected the argument that the existence of a dedicated self-defense statute demonstrates "a legislative purpose to exclude the justification claimed for the conduct."[12] Instead, it clung to its prior holdings that such purpose must be manifest from the face of the charged offense,[13] even though no penal code offense contains such language. The Court has been clear.

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[10] *Williams v. State*, 630 S.W.2d 640, 643 (Tex. Crim. App. 1982).

[11] TEX. PENAL CODE § 9.32 (governing use of deadly force in self-defense).

[12] *Bowen v. State*, 162 S.W.3d 226, 226 (Tex. Crim. App. 2005), 230 ("self-defense's statutorily imposed restrictions do not foreclose necessity's availability").

[13] *Id*. at 228-29; *Spakes v. State*, 913 S.W.2d 597, 598 (Tex. Crim. App. 1996).

But the Court is wrong, for all the reasons Presiding Judge Keller explained in her respective dissents.[14] It makes no sense to allow a defendant to benefit from a generic, "catch-all"[15] justification defense when the Legislature has detailed the circumstances under which the use of force (or deadly force) is justified. This is especially true when the actor cannot satisfy the more specific statute. This Court's practice of allowing necessity to justify the use of force against another instead of self-defense[16] is thus inconsistent with the doctrine of *in pari materia*[17] and the Government Code.[18] The split in the lower courts on this subject even after *Bowen* is understandable, if not predictable.[19] This Court should reconsider this line of cases.

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[14] *Bowen*, 162 S.W.3d at 230 (Keller, P.J., dissenting); *Spakes*, 913 S.W.2d at 601-05 (Keller, J., dissenting).

[15] *Bowen*, 162 S.W.3d at 230 (Keller, P.J., dissenting).

[16] *See*, *e.g.*, *Juarez v. State*, 308 S.W.3d 398, 400 (Tex. Crim. App. 2010) (applying necessity to aggravated assault of a peace officer with a deadly weapon).

[17] *Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988) ("'[W]here a general statute and a more detailed enactment are in conflict, the latter will prevail, regardless of whether it was passed prior to or subsequently to the general statute, unless it appears that the legislature intended to make the general act controlling.'") (quoting 53 Tex. Jur. 2d, Statutes, Section 186 (1964) p. 280).

[18] TEX. GOV'T CODE § 311.026(b) ("If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.").

[19] *Compare*, *e.g.*, *Castro v. State*, No. 13-17-00266-CR, 2019 WL 3484426, at *1-3 (Tex. App.—Corpus Christi Aug. 1, 2019, no pet. h.) (not designated for publication) (following *Bowen* and rejecting the view of numerous courts that TEX. PENAL CODE § 9.32 embodies a "legislative purpose"), *with Striblin v. State*, No. 04-17-00826-CR, 2019 WL 1049233, at *4 (Tex. App.—San Antonio Mar. 6, 2019, pet. filed) (not designated for publication) (reviewing many of the same cases and reaching the opposite conclusion, ignoring *Bowen* altogether).

ii. "Ordinary standards of reasonableness" forbid a necessity defense in this case.

Regardless of whether the policies that prompted the creation and periodic amendment of the self-defense statutes prohibit a necessity defense under subsection (3), they should inform the determination of whether appellant's conduct could be clearly correct according to ordinary standards of reasonableness under subsection (2). This balancing of harms is a "case-by-case" inquiry.[20] In this case, the balance favors the innocent homeowner.

Appellant set the terms of engagement. Assuming he had permission to be in the home to feed the cats, he knew he did not have the victim's permission. He suspected his presence would not be appreciated. He now claims that the victim might well have harbored an independent reason to dislike him that "compounded" all these other factors. Yet, after being unable to sneak out, he chose to hide in the bedroom closet of the person from whom he was hiding. It is difficult to imagine how a rational jury could conclude "the desirability and urgency of avoiding [being assaulted by a homeowner in whose closet you're hiding] clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by [criminalizing aggravated assault.]" Put another way, how could any jury decide—be allowed to decide—that an actor who knows he has good reason to fear being discovered by an innocent homeowner in the homeowner's bedroom closet "clearly"

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[20] *Williams*, 630 S.W.2d at 643 n.2.

has a greater right to live than that homeowner?

This is not a necessity case.

II. Alternatively, appellant has established harmlessness after the fact.

If this Court concludes that a jury should be permitted to pass on appellant's claimed justifications, the likelihood that he would have been acquitted, *i.e.*, harm, should be re-examined.

Because of the way appellant presented his argument to this Court the first time around, the harm analysis was decided as though the aggravated assault happened on a street or at a party: 1) there's a shooting, 2) the defendant basically says he did it and explains why he was afraid, and, 3) in the absence of a defensive instruction, the jury has nothing left to do but convict.[21] But this aggravated assault happened as part of an alleged burglary; even if appellant had consent to be in the home, he was caught hiding inside a bedroom closet by someone he knew had not given it. Appellant now seizes upon that context, making the apparent (to the victim) illegality of his presence in the house the lynchpin of his "reasonable belief" argument. Had he focused on this aspect of the case the last time up, the outcome might well have been different.

The unusual history of this case and its shifting arguments justifies a holistic approach to its resolution. The infirmities of the lower court's reasoning notwithstanding, it was right to twice deny appellant a new trial for the purpose of

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[21] *Rogers v. State*, 550 S.W.3d 190, 192 (Tex. Crim. App. 2018) (denial is "rarely harmless").

justifying his assault on an innocent homeowner. If the Court disagrees with the State on entitlement but now thinks differently about harm due to appellant's new argument for entitlement, justice can still be achieved by dismissing this petition as improvidently granted.

III. Some clarification is required should a new trial be ordered.

If entitlement and harm both make sense such that a new trial is required, that jury will need proper guidance on how to apply justification to a nested offense like burglary with the commission of an assault.

This Court has consistently held that justification defenses are in the nature of confession-and-avoidance. It is important that they be applied only when those conditions are fulfilled, *i.e.*, the defendant admits all the elements of the offense. Appellant cannot be justified in committing burglary because he denied entering without consent. As this Court recognized the first time around, his justification goes only to the aggravated assault.[22] He tried to justify that assault, but that is not the same as justifying a burglary. The problem is how to explain this to the jury.

The problem is better illustrated by a defendant who 1) is charged with aggravated assault causing serious bodily injury, 2) claims self-defense using non-deadly force, but 3) denies causing serious bodily injury. He should not be entitled to a self-defense instruction on aggravated assault because he has denied an element

[22] *Id.* at 193 n.1.

of the offense. His defense to aggravated assault is that none occurred. It is a fine defense that requires acquittal if believed. If the lesser-included offense of simple assault is requested by either party, the defendant would be entitled to an instruction on section 9.31 on that lesser-included offense. But he never confessed to committing aggravated assault and could not be justified for it.

This splitting of charged offenses based on a defendant's testimony can get complicated but is required to retain the confession-and-avoidance nature of justification defenses. Applied to this case, appellant's defense to burglary is that he had consent to enter. A jury should acquit him of burglary if they believe that. Appellant did admit to all the elements of aggravated assault, however, and offered a justification. If he is entitled to self-defense or necessity it is to that lesser-included offense *if* it is requested by either party. But he did not confess to a burglary and could not be justified for it.

IV. Conclusion

Appellant did not want to get seriously hurt or killed by the homeowner who found him hiding in his closet. That is understandable, even reasonable. His response was not. No actor is entitled to shoot someone they know has good reason to use lawful force against them. This argument should be rejected as a matter of law in the clearest possible terms. If that is not possible, this case should be dismissed because technical entitlement to a defense does not lead to even some harm based on

his "reasonableness" argument. If this Court decides that the lawfulness of preemptively shooting a homeowner should be a question for another jury, any justification defenses should apply only to the lesser-included offense of aggravated assault.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,903 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of August, 2019, a true and correct copy of the State's Brief on the Merits has been eFiled and electronically served on the following:

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